

April 6, 2006

Kent County - Civil Division (739-7641)

Ms. Barbara Pyle
18073 Atlanta Road
Bridgeville, DE 19933

**RE: Freedom of Information Act Complaint
Against Woodbridge School District**

Dear Ms. Pyle:

On January 24, 2005, we received your letter alleging that the Woodbridge School District (“the School District”) violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 (“FOIA”), by failing to post the agenda for a public meeting at least seven days in advance. Specifically you allege that on December 15, 2005, the School District posted an amended agenda for a meeting scheduled for December 20, 2005 with “no explanation given on the agenda as to why the item or items [added to the agenda] were not available at the time of the original posting [on December 12, 2006], as required by FOIA and by previous Attorney General opinions.”

By letter dated January 30, 2006, we asked the School District to respond to your complaint within ten days. We granted the School District a brief extension of time, and received the School District’s response on February 16, 2006. We asked the School District for additional information,

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which we received on February 17, 2006.

According to the School District, on December 12, 2005 the School District posted the notice and agenda for a public meeting scheduled for December 20, 2005. The School District re-posted the agenda for the December 20, 2005 public meeting on December 15, 2005.

The two-page agenda that you attached to your complaint apparently was not the complete amended agenda posted on December 15, 2005. The School District has provided us with the complete amended agenda, which is four pages. That amended agenda added two items of public business for discussion: Item V.B. EDIS Presentation Regarding Bid Pack B – Farm Property; and Item X.A. Request to Approve Bid Pack B. An asterix (*) appears next to both items, cross-referencing to page 4 of the amended agenda, which reads: “* THESE ITEMS ARE BEING ADDED TO THE AGENDA DUE TO RECEIPT OF INFORMATION REGARDING THE ITEMS AFTER THE ORIGINAL POSTING OF THE AGENDA.”

By letter dated February 17, 2006 (which we received on February 21, 2005), you sent us another copy of the amended agenda for the School District’s December 20, 2005 meeting. That amended agenda is double-sided (page 2 is the back side of page 1, and page 4 is the back side of page 3. At the bottom of page 3 the amended agenda is printed “-OVER-“ and page 4 contains the asterix with the reasons for the delay in posting the two items added to the agenda. You contend that “the posting of the agenda with the items of the backside does not constitute ‘conspicuous’ posting as required by Del. C. §10004(e)(4).”

RELEVANT STATUTES

FOIA provides that a public body shall give notice to the public of a regular meeting and post an agenda “at least 7 days in advance thereof.” 29 *Del. C.* §10004(e)(2). The agenda must include “a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor . . .” *Id.* §10001(f)).

FOIA authorizes a public body to amend an agenda up to “6 hours in advance of said meeting,” but “the reasons for the delay in posting shall be briefly set forth in the agenda.” *Id.* §10004(e)(5).

FOIA provides that “[p]ublic notice required by this subsection shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available.” *Id.* §10004(e)(4).

LEGAL AUTHORITY

“FOIA provides two distinct methods to amend an agenda. First, FOIA allows a public body to change an agenda ‘to include additional items including executive sessions or the deletion of items including executive sessions *which arise at the time of the public body’s meeting.*’ 29 *Del. C.* §10004(e)(2). Second, FOIA allows a public body to amend an agenda when it ‘is not available at the time of the initial posting of the public notice’ so long as it is added ‘to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the

agenda.’ *Id.* §10004(e)(5).” *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (emphasis added). ¹

We have previously recognized “that the business of government does not stop seven days before a public meeting, but FOIA provides flexibility for a public body to amend the agenda up to six hours prior to a meeting to add items that come up suddenly and cannot be deferred to a later meeting.” *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (school district only learned of the need for a construction contract change order the morning of the scheduled meeting, “but it did not avail itself of this exception by posting an amended agenda six hours in advance”).

In this case, the School District availed itself of this exception by posting an amended agenda five days in advance of the December 20, 2005 meeting to add “EDIS Bid Pack B -- Farm Property.” That amended agenda complied with Section 10004(e)(5) of FOIA by stating that the reason for the delay in posting the EDIS bid specifications was “due to the receipt of information regarding the items after the original posting of the agenda.” The Superintendent confirmed by letter dated February 14, 2006 to the School District’s counsel that the School District “did not receive the specifications for Bid Pack B until December 15, 2005 and on that same date we reposted the agenda for the agenda to include that item on the December 20, 2005 agenda.”

That does not end our inquiry, however. In previous opinions, “[w]e have cautioned that this

¹ In its response to your complaint, the School District relies on Section 10004(e)(3) of FOIA, which authorizes a public body to give only 24-hours notice for a special meeting so long as the notice includes “an explanation as to why” seven days’ notice could not be given. Section 10004(e)(3) applies to the initial posting of the notice for a special meeting. Section 10004(e)(3) does not apply where, as here, the public body publishes notice at least seven days in advance, but then amends the agenda prior to the meeting. Under those circumstances, Section 10004(e)(5) authorizes the public body post an amended agenda up to six hours in advance so long as “the reasons for the delay in posting [are] briefly set forth in the agenda.”

exception does not authorize a public body to amend the agenda prior to a meeting for any reason, but rather applies ‘to add items that come up suddenly and cannot be deferred to a later meeting.’” *Att’y Gen. Op.* 05-IB15 (June 20, 2005) (quoting *Att’y Gen. Op.* 05-IB09 (Apr. 11, 2005)).

According to the School District, it did not receive the bid specifications from its construction manager (EDIS) until December 15, 2005 (five days before the scheduled December 20, 2005 public meeting). The School District needed to approve the bid specifications before sending them to prospective bidders on a project involving four separate contracts. As explained by the School District: “The bids on this construction project were scheduled to be opened on January 31, 2006 and the [School District] had been advised by its construction manager to allow at least a 30 day window between posting and advertising notice of the projects and sending bid specifications to prospective bidders prior to the scheduled bid opening on January 31, 2006.” According to the School District, if it had not approved the EDIS bid specifications at its meeting on December 20, 2005, that would have delayed the construction project because the next regularly scheduled meeting of the School District was not until January 24, 2006.

We are satisfied that under these circumstances there was a sufficient reason for the School District to amend the agenda five days before the December 20, 2005 meeting to include the EDIS bid specifications which the School District did not receive until December 15, 2005.

The final issue for our consideration is whether the posting of a double-sided agenda satisfied FOIA’s requirement that a public body post an agenda “conspicuously.” “The purposed of requiring conspicuous posting of notice at the public body’s principal office ‘is to ensure that no member of the public will have to search out to discover public meetings.’” *Att’y Gen. Op.* 97-IB13 (June 2,

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1997) (quoting *Att’y Gen. Op.* 96-IB26 (July 25, 1996)). In those earlier opinions, however, the public body did not post the agenda at its principal office but rather in a local newsletter or a county administrator’s report. Here, there is no dispute that the School District posted the amended agenda for the December 20, 2005 meeting at its principal office. The issue is not the place of posting, but rather the form.

We do not believe that the use of a double-sided agenda puts a burden on members of the public to search out to discover public meetings. There is no evidence in the record that any members of the public were mislead into not attending the School District’s December 20, 2005 meeting because they were not aware of the matters of public business noticed on the backside of the agenda. Even if a citizen flipped from the first to the second page of the amended agenda, it is clearly numbered “Page 3” and the agenda items on the first page (I. through VI.) skipped to Item X. In addition, at the bottom of “Page 3” the agenda states “-OVER-“ alerting the reader that there is a fourth page.²

CONCLUSION

For the foregoing reasons, we determine that the School District did not violate the open meeting requirements of FOIA. Pursuant to Section 10004(e)(5) of FOIA, the School District amended the agenda for the December 20, 2005 meeting at least six hours in advance to include two

² FOIA does not expressly authorize nor prohibit the use of a double-sided agenda. We note that under other circumstances the use of such a format might prove misleading to the public.

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new items, and the School District stated the reason for the additions in the amended agenda. The record shows that there was a sufficient reason for the School District to amend the agenda five days before the December 20, 2005 meeting to include the EDIS bid specifications which the School District did not receive until December 15, 2005.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Carl C. Danberg
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